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11 UNITED STATES DISTRICT COURT  
12 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

13 \_\_\_\_\_ )  
14 TDY HOLDINGS, LLC and TDY )  
INDUSTRIES, LLC, )

Case No. 07cv787 CAB (BGS)

15 )  
16 )  
17 Plaintiffs-Counterclaim Defendants, )

**DATE and TIME:**

Monday, April 9, 2012 at 2:30 p.m.

18 v. )

**PLACE:** Courtroom 2

19 UNITED STATES OF AMERICA, UNITED )  
STATES DEPARTMENT OF DEFENSE and, )  
20 LEON E. PANETTA, in his official capacity as )  
SECRETARY OF DEFENSE, )

21 Defendants and Counterclaimants. )  
22 \_\_\_\_\_ )

**Hon. JUDGE**

**CATHY ANN BENCIVENGO**

23  
24  
25 **GOVERNMENT MEMORANDUM IN OPPOSITION**  
26 **TO TDY'S MOTION IN LIMINE NO. 5 TO STRIKE**  
27 **EXPERT TESTIMONY BY TOMMY B. JORDAN**  
28

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## I. INTRODUCTION

The Government respectfully submits this memorandum in opposition to TDY's motion to exclude (Dkt. No. 201) large portions of the October 2011 expert testimony of Tommy B. Jordan. TDY claims that Mr. Jordan offered opinions that were not contained in his October 26, 2009 or November 16, 2009 reports, and that those opinions should be excluded as a Rule 37 sanction. As a further sanction, TDY argues that any testimony that Mr. Jordan gave regarding documents that he did not cite in his 2009 reports should be stricken. TDY's motion has no merit, and no sanctions are warranted.

## II. BACKGROUND

On September 28, 2009, the Government timely designated Mr. Jordan as a Government procurement practices and policies expert. *See* US Ex. 1 hereto. TDY was required to designate its rebuttal experts no later than October 9, 2009. *See* Dkt. No. 94 at ¶ 2. TDY chose not to designate any expert witness on Government procurement matters. *See* US Exs. 2 and 3 hereto. The expert reports and depositions in this case, including Mr. Jordan's, began in late October 2009 and were completed in mid-December 2009, pursuant to the Court's scheduling orders. Due to the deterioration of Mr. Jordan's health over the following two years, and pursuant to Judge Skomal's September 12, 2011 Order (*see* Dkt. No. 180), the parties took the expert testimony of Tommy B. Jordan by deposition near his home in San Antonio, Texas over the course of five days in October 2011.<sup>1</sup> On two of those days, TDY counsel conducted *voir dire* and cross-examination. *See* TDY Ex. D.

Mr. Jordan testified regarding his knowledge and experience in: (1) the award, negotiation, use, and administration of military supply contracts, and military facilities contracts; (2) the nature and purposes of military specifications; and (3) the duties and responsibilities of Department of Defense inspectors, administrators, and auditors who interact

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<sup>1</sup> Based on Mr. Jordan's declining health, the Government advised TDY in August 2011 of its intent to designate a substitute expert, who would then prepare his own report and be deposed thereon. TDY opposed the Government's subsequent motion, and the Court instead allowed the Government to proceed with Mr. Jordan's testimony by deposition.

1 with contractor personnel. He testified regarding military procurement practices, policies, and  
 2 terminology, and his specialized understanding regarding numerous military procurement issues  
 3 at the heart of this case.

4 Mr. Jordan's testimony is intended to assist the Court in understanding the complex  
 5 record in this matter. The core of TDY's case is that the Government should be held  
 6 responsible for most of the pollution cleanup costs based on 60 years of TDY's performance of  
 7 hundreds of military prime contracts and subcontracts at the Harbor Drive plant (the "Site"),  
 8 alleged military control of Site operations through contracts and specifications, and alleged  
 9 Government reimbursement of TDY's costs of hazardous waste cleanup pursuant to  
 10 Government cost accounting rules and policies. *E.g.*, Amended Compl. ¶¶ 2-3, 16, 18-21, 27-  
 11 28, 34-35, 39-41, 44, 46-48. Moreover, three months after all discovery closed, TDY first  
 12 asserted that the Government owned the chemicals and chemical wastes used or generated by  
 13 TDY in performing those contracts by virtue of "progress payment" clauses in certain contracts  
 14 with the military. *See infra* at 4-5. TDY also argued for the first time that the Government had  
 15 waived TDY's indemnification promises, contract releases, and contract claim waivers. *See*  
 16 *infra* at 6-7. Mr. Jordan's testimony is intended to assist the Court in resolving these and other  
 17 Government procurement policy, practice and procedure issues.

### 18 **III. MR. JORDAN'S EXPERT QUALIFICATIONS**<sup>2</sup>

19 Mr. Jordan's testimony was based on his more than 39 years of hands-on experience in  
 20 Government procurement with the United States Air Force, beginning as an entry level contract  
 21 trainee in 1962, and including his 26 years as a fully warranted Procuring Contracting Officer  
 22 ("PCO"), and on his supervision of and working with other military procurement personnel.

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23  
 24 <sup>2</sup> TDY appears to claim a right to file a *Daubert* motion regarding Mr. Jordan during trial.  
 25 TDY Mem. 2 n.1, 11 n.6. TDY has no such right. TDY questioned Mr. Jordan on *voir dire* and  
 26 on cross examination in October 2011. "All" *Daubert* and other pretrial motions had to be filed  
 27 by March 9, 2012, in accordance with the Court's February 24, 2012 Order. Dkt. No. 193.  
 28 TDY filed five such motions pursuant to that Order, and may not file further motions that were  
 due by March 9. TDY has therefore waived its right to file any *Daubert* or other pretrial  
 motions as to Mr. Jordan or any other Government expert.

1 TDY Ex. D at 18-21, 24-25, 28-36. In order to perform his work negotiating, awarding, and  
2 administering contracts with military equipment suppliers such as TDY, he consulted on a daily  
3 basis the Armed Services Procurement Regulations (“ASPR”) and their 1984 successor, the  
4 Federal Acquisition Regulations (“FAR”). TDY Ex. D at 51 -52. He attended continuing  
5 education courses offered by the Air Force on price analysis, negotiations, source selection  
6 procedures and techniques, and the use of specifications. TDY Ex. D at 19, 21-23, 73.

7 Mr. Jordan’s responsibilities as a PCO included translating the requirements of the  
8 engineers and program managers into contractual provisions and to negotiating the terms of  
9 contracts with industry. TDY Ex. D at 39-42. After contracts were awarded, he became the  
10 interface between the Air Force, the contactor and the Administrative Contracting Officer. TDY  
11 Ex. D at 41-43.

12 Mr. Jordan handled procurements with hundreds of defense contractors, including some  
13 of the largest in this country, and reviewed and approved in excess of 1,000 contracts negotiated  
14 by subordinates. TDY Ex. D at 38. He worked with an estimated 100 government inspectors  
15 from the Defense Contract Administrative Service during his time as a warranted contracting  
16 officer. TDY Ex. D at 38-39. From 1994 through 1996, he served as an Air Force Director of  
17 Contracting, a promotion that required the approval of the Secretary of the Air Force. TDY Ex.  
18 D at 34-35. In that position, he supervised more than 600 contracting professionals and oversaw  
19 contract obligations of more than \$2 billion. TDY Ex. A at 1. At the time of his retirement in  
20 2001, Mr. Jordan was one of the most senior civilian procurement officials in the Air Force. He  
21 is eminently qualified to testify based on his specialized knowledge and vast practical  
22 experience regarding military procurement understandings and customs, usage of clauses,  
23 practices, and parlance.

24 In 2003, the court in *Miami-Dade County, Fla. v. United States*, 345 F. Supp. 2d 1319,  
25 1328-29 (S.D. Fla. 2004), accepted Mr. Jordan as an expert in Government procurement  
26 practices, policies and procedures, including many of the specific subjects at issue here. The  
27 court relied on Mr. Jordan’s expert testimony in the context of solicitation of bids, competitive  
28 bidding, awarding of contracts, types of Government contracts, and the use of a series of



uniform contract clauses and standard contract forms. *Id.* at 1352. The court also accepted Mr. Jordan's expert testimony regarding the duties of Air Force personnel who interacted with private contractors: Government contracting officers, quality inspection personnel, and property accountants. *Id.* at 1329. The court also relied on Mr. Jordan's "uncontradicted expert testimony" relating to "direct materials" and "indirect materials," as those terms were used in military contracting, and a contractor's ownership of the chemicals it used in performing military contracts. *Id.* at 1348.

#### IV. ARGUMENT

TDY's motion to exclude large portions of Mr. Jordan's testimony has no merit. First, its claims of prejudice do not withstand scrutiny. As noted above, the Government timely designated Mr. Jordan as a Government procurement practices and policies expert in September 2009, and TDY chose not to designate any rebuttal witness on Government procurement matters in October 2009. TDY's complaint now that it "has been denied the opportunity to present a rebuttal expert regarding [such] opinions" (TDY Mem. at 11) should therefore be dismissed. Further, TDY makes no claim that Mr. Jordan's October 2011 testimony will cause any delay or disruption of the trial schedule here. Mr. Jordan's testimony addressed no issue of which TDY was not already aware, and TDY was not prejudiced in any other way.

Accordingly, preclusion sanctions are entirely unwarranted and should be denied. As shown below, each of the eight challenged opinions was either not new or was in rebuttal to TDY's late arguments. All should be considered by the Court.

##### A. **MR. JORDAN'S TESTIMONY REGARDING MILITARY PROGRESS PAYMENT CLAUSES WAS IN DIRECT RESPONSE TO TDY'S MARCH 2010 RELIANCE ON THEM AND SHOULD BE ADMITTED**

TDY complains (alleged New Opinion #1) about Mr. Jordan's October 2011 testimony regarding progress payment clauses in Government contracts. TDY Mem. 5. TDY fails to disclose, however, that this testimony was made necessary by new arguments that TDY made for the first time after discovery closed.

TDY argued in its March 22, 2010 opposition to the Government's February 22, 2010 motion for partial summary judgment on liability issues that the "Government held title to the

1 ‘chemicals or wastes’ that contaminated the Site because the Government paid TDY progress  
 2 payments pursuant to various contracts . . . .” Dkt. No. 153 at 12; Dkt. 153-1 at ¶¶ 42-45.<sup>3</sup>  
 3 TDY made this assertion three months after the close of expert discovery in December 2009.  
 4 TDY had never before referenced progress payments clauses in the Complaint, in the Amended  
 5 Complaint, or in its interrogatory responses.

6 It is true that in late November 2009, near the end of expert discovery, one of TDY’s  
 7 experts, Robert M. Zoch, Jr., stated in deposition that Government ownership of discarded  
 8 chemical wastes generated at the plant was “possible” under government contract progress  
 9 payment provisions. *See* Dkt. No. 202 – Gov’t Zoch Motion Ex. 4 at 424-27.<sup>4</sup> However, he  
 10 also testified that he did not know whether title to any raw material chemicals purchased by the  
 11 company actually vested in the Government by virtue of progress payment clauses, had not seen  
 12 any direct documentary evidence of such ownership, that it was only a “possibility,” and that he  
 13 did not know which contracts had such provisions. *Id.* These uncertain and unsupported  
 14 comments were insufficient to raise this issue and give the Government a meaningful  
 15 opportunity to develop it with further discovery and independent research at that time.

16 Basic fairness demands that the Government be allowed to defend itself against TDY’s  
 17 March 2010 progress payment assertion with both the relevant exhibits and Mr. Jordan’s  
 18 testimony.

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20  
 21 <sup>3</sup> TDY’s March 2010 Statement of Disputed Facts relied on a 2008 deposition in which a  
 22 witness did not mention progress payments at all, on a 2009 deposition in which another witness  
 23 said nothing to indicate that the payment of progress payments operated to vest title in the  
 24 Government, and on Mr. Jordan’s 2009 testimony relating to Government title to “material in  
 25 process.” In that Statement, for the first time in this case, TDY referenced an ASPR provision  
 26 pertaining to progress payments. Dkt. 153-1 at ¶¶ 42-45. Mr. Jordan explained at his trial  
 deposition (TDY Ex. D at 492-97) that material in process refers to the unfinished deliverable  
 end product and items of value, not to chemicals which are not incorporated into the product  
 such as those used to clean or process metal.

27 <sup>4</sup> The Government has moved under *Daubert* for an order finding Mr. Zoch unqualified to  
 28 offer expert opinions regarding this and other Government procurement matters. Dkt. No. 202.

**B. MR. JORDAN'S TESTIMONY AS TO THE LACK OF GOVERNMENT OFFICERS' AUTHORITY TO WAIVE TDY'S INDEMNIFICATION PROMISES AND TDY'S WAIVERS OF CLAIMS AGAINST THE GOVERNMENT WAS IN RESPONSE TO A CONTENTION BY TDY AFTER THE CLOSE OF DISCOVERY**

TDY also seeks to exclude (alleged New Opinion #2) Mr. Jordan's testimony regarding the lack of authority of Government contracting personnel to waive the Government's contract rights. TDY Mem. 5. However, this testimony was also made necessary by a new argument that TDY raised for the first time after the close of discovery.

As it had regarding progress payments, TDY argued for the first time in its March 22, 2010 opposition brief that the Government, by allegedly reimbursing TDY pursuant to 1980s and 1990s production contracts for environmental cleanup overhead costs at the Harbor Drive plant, waived the indemnification promises that TDY had made to the Government in the 1950s through 1970s facilities contracts.<sup>5</sup> See Dkt. 153 at 31-32. TDY argued that such 1980s and 1990s reimbursements were a "course of dealing" by which the Government contracting personnel waived rights held by the United States under the 1950s through 1970s contracts. *Id.* Mr. Jordan was asked to testify about this new waiver argument based on his experience and training. See TDY Ex. D at 103-06.

In his October 2009 report, Mr. Jordan in fact addressed TDY's indemnification promises, contract releases, and novation waivers at length (TDY Ex. A at 3, 26-30), contrary to TDY's suggestions otherwise. TDY Mem. 5. Mr. Jordan's testimony in October 2011 addressed them as well (TDY Ex. D at 97-102). He then addressed TDY's related new argument concerning the alleged Government course of dealing that allegedly waived these and

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<sup>5</sup> At trial, the evidence will show that such promises were mandatory provisions under the policies set out in all of the Armed Services Procurement Regulations of that era and would have been contained in all four known TDY facilities contracts that governed TDY's possession and use of Government-owned machine tools and other equipment. For example, such a promise was included in TDY's surviving 1967 facilities contract in which TDY agreed to "indemnify and hold the Government harmless against claims for injury to persons or damage to property of the Contractor or others arising from the Contractor's possession or use of" the Government-owned machine tools and equipment. Trial Ex. 5714 - US0061563-608 at 575.

1 other Government contract rights, by testifying that the personnel who authorized such  
2 reimbursements had no authority to waive such rights. TDY Ex. D at 103-06.<sup>6</sup>

3 At his trial deposition in October 2011, TDY counsel cross-examined Mr. Jordan at  
4 length on whether Government procurement officers had the authority to waive such  
5 Government rights, as TDY had first contended in March 2010. TDY Ex. D at 537-42.  
6 Because Mr. Jordan had in fact addressed the TDY indemnification promises, contract releases,  
7 and novation waivers in his October 2009 report, TDY counsel could also have cross-examined  
8 him on the waiver authority issue during his December 2009 expert deposition. TDY Ex. C.

9 TDY therefore offers no viable basis for striking Mr. Jordan's testimony on the  
10 "authority" issue, and provides no basis to exclude any of the deposition testimony relating to  
11 the indemnification promises, contract releases, and novation waivers themselves.

12 **C. MR. JORDAN'S TESTIMONY CORRECTING MR. ZOCH'S**  
13 **NOVEMBER 2009 TESTIMONY REGARDING THE MEANING OF**  
14 **THE MILITARY TERM "ZONE OF INTERIOR" IS PROPER**

15 TDY seeks to strike (alleged New Opinion #6) Mr. Jordan's testimony regarding the  
16 meaning of a military term of art: "zone of interior." TDY Mem. 6. This was in response to  
17 TDY expert testimony about that term of art, and caused no prejudice to TDY. In his November  
18 23 and 24, 2009 deposition, Mr. Zoch claimed that the term "Zone of Interior" referred to a  
19 portion of TDY's plant. *E.g.*, Dkt. No. 202 - Govt. Zoch Motion Ex. 4 at 40-47. TDY had not  
20 previously made this assertion. TDY chose not to ask Mr. Jordan about this term at either of his  
21 December 16, 2009 depositions. *See* US Ex. 6 hereto; TDY Ex. C.

22 Mr. Jordan testified in October 2011 about this military term based on his experience  
23 and training. Mr. Jordan testified that the term "Zone of Interior" referred to the continental  
24

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25 <sup>6</sup> In his October 2009 expert report, Mr. Jordan addressed the limited authority of  
26 Government procurement personnel with regard to a specific Navy contract. Mr. Jordan stated  
27 that a "Technical Engineering representative does not have the authority to alter any contractual  
28 obligations or to change the statement of work and that any alterations or changes to the contract  
or the contract work statement which are desired by the government will be issued in writing  
and signed by the Contracting Officer." TDY Ex. A at 74.

1 United States, as distinguished from military theaters of operation, and that it had nothing at all  
 2 to do with any contractor's factory. TDY Ex. D - Jordan Dep. 409-11. TDY counsel had every  
 3 opportunity to cross-examine Mr. Jordan on this point in October 2011, and could also have  
 4 referenced any contrary evidence on its November 2011 trial exhibit or witness lists. TDY  
 5 offers no basis to strike Mr. Jordan's testimony refuting the erroneous testimony of TDY's  
 6 expert.

7 **D. MR. JORDAN'S TESTIMONY REGARDING REIMBURSEMENT OF**  
 8 **CONTRACTOR ENVIRONMENTAL CLEANUP COSTS UNDER**  
 9 **GOVERNMENT COST ACCOUNTING RULES AND PRINCIPLES DID**  
 10 **NOT PERTAIN TO A NEW ISSUE OR OPINION**

11 TDY argues (alleged New Opinion #3) that Mr. Jordan's testimony in October 2011  
 12 regarding the allowability and Government reimbursement of contractors' environmental  
 13 cleanup costs is a new opinion, even though TDY admits that two years ago, Mr. Jordan  
 14 provided "a one paragraph opinion dealing exclusively with the language of an October 14,  
 15 2009 DCAA Audit Guidance on the Allowability of Environmental Costs." TDY Mem. 5-6.  
 16 TDY quibbles that the November 2009 discussion did not specifically mention TDY or what are  
 17 known as "advance agreements." *Id.* at 6.<sup>7</sup>

18 TDY can make no credible claim of prejudice from Mr. Jordan's October 2011  
 19 testimony regarding Government cost accounting rules principles because the issue is not new.  
 20 TDY alleged in its 2007 Complaint that the bases for Government liability included its payment  
 21 of TDY overhead cost pools in which the company included environmental cleanup costs. *See*  
 22 Dkt. No. 1 at ¶ 48. TDY then argued in Mr. Zoch's October 26, 2009 report that the  
 23 Government's alleged reimbursement of TDY's cleanup costs should be an equitable factor to  
 24 be considered by the Court. *See* Dkt. No. 202 – Gov't Zoch Motion Ex. 1 at 37. Moreover, Mr.  
 25 Jordan more than adequately addressed the subject in his November 2009 rebuttal report. TDY

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26 <sup>7</sup> Advance agreements are used in order to reach agreement on the allowability and  
 27 reasonableness of certain kinds of costs before they are submitted for Government  
 28 reimbursement by the contractor, thereby avoiding disputes and difficulties regarding  
 reimbursements. TDY Ex. D at 154-155.

1 Ex. B at 9-10. TDY cannot legitimately argue that this was a new issue in the case, or that it  
 2 was prejudiced or surprised that Mr. Jordan again addressed reimbursement of contractor costs  
 3 in his October 2011 trial deposition.

4 More importantly, in December 2009, TDY counsel cross-examined Mr. Jordan at  
 5 length on this subject, including advance agreements. *See, e.g.*, US Ex. 6 at 17-18, 21-25, 28-  
 6 29, 31-33, 44, 46, 68-70, 76-80, 86, 119-20.<sup>8</sup> In October 2011, TDY counsel again cross-  
 7 examined Mr. Jordan at length on this subject and the relevant deposition exhibits, all of which  
 8 had been produced by the parties years ago. TDY Ex. D at 510-15, 525-27, 537-40, 570-73.  
 9 Here as well, TDY could also have included contrary evidence on its November 2011 trial  
 10 exhibit or witness lists regarding this subject.

11 It is therefore only fair that the Government be allowed to address fully TDY's  
 12 contentions regarding reimbursement of contractors' environmental costs. TDY offers no basis  
 13 for striking any of Mr. Jordan's testimony regarding Government reimbursement of contractors'  
 14 environmental cleanup costs or regarding the pertinent Government guidance and other policy  
 15 documents.

16 **E. MR. JORDAN'S TESTIMONY THAT GOVERNMENT**  
 17 **EQUIPMENT DID NOT CONTAIN HAZARDOUS SUBSTANCES**  
 18 **AND THAT GOVERNMENT PERSONNEL DID NOT INSPECT TDY'S**  
 19 **WASTE HANDLING ACTIVITIES RESPONDED TO**  
 20 **CONTENTIONS MADE BY TDY AFTER DISCOVERY CLOSED**

21 TDY further contends (alleged New Opinion #4) that Mr. Jordan offered new opinions  
 22 on two subjects: what TDY misleadingly characterizes as testimony regarding "Government  
 23 Equipment Containing Hazardous Substances," and "Government Inspection of Chemical  
 24 Waste." TDY Mem. 6. To the contrary, Mr. Jordan testified that the Government did not

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25 <sup>8</sup> Contrary to TDY's assertions (TDY Mem. 6), the fact that some or all of Mr. Jordan's  
 26 October and December 2009 testimony on this subject occurred during questioning by TDY's  
 27 counsel in Mr. Jordan's Rule 30(b)(6) deposition is immaterial. Whether the subject was  
 28 explored by TDY's counsel during Mr. Jordan's 2009 expert testimony or during his Rule  
 30(b)(6) deposition, TDY clearly knew of the subject and cross-examined the witness on it some  
 2.5 years ago.

1 deliver equipment containing hazardous substances to the TDY plant, and that the Government  
2 was not responsible for or involved in inspecting TDY's chemical waste handling activities.

3 On July 2, 2010, TDY advised the Court of the decision in *American Int'l Specialty*  
4 *Lines Ins. Co. v. United States*, No. CV09-1734-AHM (RZx), 2010 U.S. Dist. LEXIS 65590  
5 (C.D. Cal. June 30, 2010) ("*AISLIC*"). Dkt. No. 165. TDY contended that the decision was  
6 relevant to TDY's argument that Government liability here arises from releases of hazardous  
7 substances from Government-owned equipment used by TDY at the plant. *Id.* Mr. Jordan's  
8 October 2011 testimony bore directly on this TDY assertion regarding *AISLIC*, and his  
9 testimony drew distinctions between the facts found in *AISLIC* and those here.<sup>9</sup>

10 Second, in Mr. Jordan's October 2009 report, and in his October and December 2009  
11 deposition testimony, Mr. Jordan repeatedly stated that Government personnel had no duties or  
12 responsibilities pertaining to, and were not involved in, TDY's waste disposal decisions,  
13 facilities or actions. *E.g.*, TDY Ex. A at 3, 25, 36, 38, and 44; TDY Ex. C at 96-97. It therefore  
14 cannot credibly be said that the October 2011 testimony and exhibits on the subject were new.

15 In any event, TDY's counsel had a full and fair opportunity to cross-examine Mr. Jordan  
16 on both of these subjects in October 2011. Moreover, TDY could have referenced contrary  
17 evidence in its November 2011 trial exhibit list and designated witnesses to testify to the  
18 contrary.

19 ///

20 ///

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21  
22 <sup>9</sup> Specifically, Mr. Jordan testified that he had found no evidence that: (1) the government  
23 contracted with TDY to deliver any Government-owned equipment containing hazardous  
24 substances to the plant in order for TDY to refurbish or repair that hardware; (2) any contracts  
25 with TDY called for testing of government equipment that contained such substances; (3) any  
26 such contracts called for the provision of quantities of hazardous substance raw materials in  
27 excess of those needed for contract performance; (4) the Government provided any such  
28 substances to TDY as Government-furnished material; (5) that by its contracts with TDY the  
Government intended to dispose of such substances; and (6) during what is known as "process  
inspection," the Government inspected or otherwise got involved in contractor disposal of  
chemical wastes. TDY Ex. D at 126-130, 247-48.



**F. MR. JORDAN'S TESTIMONY REGARDING THE ABSENCE OF GOVERNMENT THREATS TO SEIZE TDY PROPERTY DURING WORLD WAR II DID NOT RAISE A NEW ISSUE**

TDY claims (alleged New Opinion #7) that Mr. Jordan offered new opinions regarding what TDY misleadingly characterizes as the "Military's Threats to Seize [TDY] Property During World War II." TDY Mem. 7. In fact, evidence at trial will establish that the military never made any such threats to TDY. TDY claims that Mr. Jordan's testimony regarding a few wartime telegrams is new, but TDY's counsel asked him about those same telegrams in 2009 (TDY Ex. C at 63-64). Mr. Jordan further testified in 2009 that he knew of nothing in military "contracting regulations that [gave] the government the right to confiscate property" and that he had seen no documents that any such authority "existed or was exercised" during World War II. *Id.* at 62-63. Thus, Mr. Jordan's testimony on this subject in October 2011 did not provide new opinions.

TDY also misquotes Mr. Jordan's 2009 testimony. TDY Mem. 7. TDY claims that Mr. Jordan said in 2009 that he did not "have enough information to offer an opinion on" the telegrams, because the telegrams were "outside my scope of expertise in contracts." *Id.* However, what Mr. Jordan actually said was that he did not have enough information to dispute Dr. Carlisle's opinion as TDY's historian that if a company did not cooperate with Government in entering into wartime contracts, the Government could as a last resort take over the company entirely. *See* TDY Ex. C - Jordan Dep. 64-65.

On this subject as well, TDY could have cross-examined Mr. Jordan in October 2011 and included any available contrary evidence in its November 2011 trial exhibit or witness lists. There is therefore no basis for sanctions on this subject.

**G. MR. JORDAN'S TESTIMONY REGARDING THE USE OF DOCUMENTS BY OTHER CONTRACTORS SUCH AS THE MANUFACTURING PROCESS DATA DOCUMENTS USED BY TDY DID NOT PREJUDICE TDY**

TDY seeks (alleged New Opinion #5) to strike Mr. Jordan's October 2011 testimony based on his experience that defense contractors other than TDY used documents similar in content and purpose to TDY's Manufacturing Process Data ("MPD") documents, and that it was



1 standard practice for Government personnel to review the similar documents of other  
2 contractors to ensure that the resulting end product would comply with the specifications  
3 referenced in the supply contracts.

4 To the minor extent that this testimony went beyond his 2009 reports and extensive  
5 testimony regarding TDY's MPDs, in that Mr. Jordan testified about the use of similar  
6 documents by other defense contractors, TDY's counsel cross-examined Mr. Jordan on this  
7 closely-related matter five months ago. *See* TDY Ex. D at 590-96. TDY therefore provides no  
8 basis for its request to exclude this testimony.

9 **H. MR. JORDAN'S TESTIMONY REGARDING CONSUMABLE**  
10 **CHEMICALS DID NOT RAISE A NEW ISSUE AND DID NOT**  
11 **PREJUDICE TDY**

12 As to alleged New Opinion #8, TDY asks the Court to strike Mr. Jordan's testimony that  
13 the chromic acid used in processing, the cutting oils or lubricants used in machine tools, and the  
14 chlorinated solvents used in degreasing equipment were not incorporated into or made a part of  
15 the products that TDY manufactured for the Government. TDY Mem. 7. As will become clear  
16 at trial, this relates directly to the Government's refutation of TDY's 2010 progress payments  
17 argument. In fact, what TDY seeks to exclude is testimony on re-direct as to which TDY  
18 opened the door on cross-examination. *E.g.*, TDY Ex. D at 518-24, 675-78.

19 Moreover, on October 7, 2009, TDY counsel questioned Mr. Jordan about "material in  
20 process," and in response, Mr. Jordan stated that in his experience, progress payments  
21 provisions passed title to subassemblies or components that are produced or procured by the  
22 contractor "for inclusion in the end product" or that were identified to the end product being  
23 produced under the contract (US Ex. 4 at 87-90), but TDY counsel did not ask him at that time  
24 about the related issue of whether processing chemicals or associated wastes were also "material  
25 in process" or were property to which the Government took title.

26 Therefore, to the minor extent that this testimony went beyond Mr. Jordan's 2009  
27 reports, TDY's counsel questioned him on closely related issues in 2009, cross-examined him  
28

1 on this topic in October 2011, and could also have referenced contrary evidence through its  
2 November 2011 trial exhibit and trial witness lists.

3 **I. TDY WAS NOT UNFAIRLY PREJUDICED BY MR. JORDAN’S**  
4 **TESTIMONY**

5 TDY has not been unfairly prejudiced by any of Mr. Jordan’s October 2011 testimony.  
6 To the extent there was anything in Mr. Jordan’s October 2011 trial testimony that was not in  
7 his 2009 reports, it was provided in response to TDY’s contentions near the end or after  
8 discovery in late 2009 and early 2010. Five months ago, TDY had ample opportunity to and in  
9 fact conducted extensive *voir dire* and cross-examination of Mr. Jordan. TDY had a full and  
10 fair chance to cross-examine Mr. Jordan on all eight of his allegedly new opinions, especially  
11 because of the spacing of deposition days (October 10, 12, 14, 19, and 21, 2011) to  
12 accommodate the dialysis schedule of the witness. TDY in fact cross-examined Mr. Jordan  
13 regarding most of those opinions. If TDY had truly felt “blindsided” (TDY Mem. at 10), it  
14 could have requested more deposition time with Mr. Jordan. TDY made no effort five months  
15 ago to address with the Court the alleged prejudice about which it only now complains.

16 In addition, TDY concedes that “in many instances” the 135 “new” documents were  
17 produced by or to TDY over three years ago. TDY Mem. 4. In fact, 77 percent – 104 of the  
18 135 exhibits that TDY claims were “previously undisclosed documents” (TDY Mem. 7) – were  
19 produced before the end of 2009. *See* Ex. 7 hereto.<sup>10</sup> The remaining 31 exhibits were ASPR or  
20 FAR provisions directly responsive to TDY’s 2010 contentions. *Id.* Moreover, almost one third  
21 of the 135 allegedly undisclosed documents were also cited by the Government in its 2010  
22 partial summary judgment motion papers. *See* Dkt. Nos. 141 and 158.<sup>11</sup>

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23  
24 <sup>10</sup> TDY’s long discussion (TDY Mem. 3-4), regarding Mr. Jordan’s generalized testimony,  
25 as to what *kinds* of documents may or may not have been available to or reviewed by him in  
26 2009, references no specific documents and provides no basis for sanctions. None of the 135  
27 deposition exhibits to which TDY objects is described in these deposition excerpts. TDY Mem.  
28 4.

<sup>11</sup> If the Court were to give any credence to TDY’s claims regarding the so-called  
“previously undisclosed documents,” the Government’s attached Exhibit 7 shows when each of

**J. TDY OFFERS NO AUTHORITY IN THE FEDERAL RULES OR IN THE CASE LAW FOR THE SANCTIONS IT REQUESTS**

Just as there is no factual basis for TDY's motion, there is no legal basis either. The purpose of Rule 26(a)(2)(B) and Rule 37(c)(1) is to prevent "unfair surprise to the opposing party." *Muldrow v. Re-Direct, Inc.*, 493 F.3d 160, 167 (D.C. Cir. 2007), quoting *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 284 (8th Cir. 1995). *Accord*, *Gay v. Stonebridge Life Ins. Co.*, 660 F.3d 58, 64 (1st Cir. 2011); *Thompson v. Doane Pet Care Co.*, 470 F.3d 1201, 1203 (6th Cir. 2006). Under these cases, where by virtue of prior disclosures the moving party reasonably could have anticipated the challenged elaboration in trial testimony, there is no unfair surprise and no basis for exclusion. Based on the facts set out above, these cases require denial of TDY's motion concerning Mr. Jordan's testimony. Everything about which he testified was known to TDY and it could reasonably have anticipated his testimony.

TDY's reliance on *O'Connor v. Boeing N. Am., Inc.*, No. CV 97-1554 DT (RCx), 2005 WL 6035243 (C.D. Cal. 2005) is misplaced, in part because the plaintiffs' three experts' reports there disclosed new opinions that "would [have] improperly widen[ed] the trial issues at the eleventh hour," and thereby unduly prejudiced the defendant only weeks before trial. *Id.* at \*7. In *O'Connor*, the court detailed the pretrial hearings and orders starting two years earlier in which the court had required and cautioned plaintiffs to present the kind of exposure and causation theories that were only disclosed on the eve of trial. *Id.* at \*8 and \*10. Finally, the court added in passing and without explanation that the "new opinions *appear* based on information that was available to these experts at the time of their" first expert reports. *Id.* at \*7 (emphasis added). Unlike *O'Connor*, Mr. Jordan's testimony five months ago responded to TDY's contentions made after or just prior to the end of discovery more than two years ago, and was not the subject of judicial efforts to obtain disclosure. Unlike *O'Connor*, Mr. Jordan's

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the 135 documents was produced, and the extent to which TDY's claims in Exhibit E as to "related" testimony are excessive and overbroad. As Exhibit 7 shows, TDY attempts to have the Court exclude much more of Mr. Jordan's testimony than can be fairly said to relate to the documents, and TDY's Exhibit E should be rejected.

1 testimony on the matters covered by TDY's motion responded to TDY's 2010 contentions,  
2 raised no new issues, and to the minor extent that it expanded upon his prior opinions, did not  
3 prejudice TDY.

4       The facts in TDY's other cases are also wholly different from those relating to Mr.  
5 Jordan and provide no guidance for the Court here. In *Cueto v. Overseas Shipholding Grp.*, No.  
6 10cv1243 LAB (NLS), 2012 WL 28357 at \*2 (S.D. Cal., Jan. 4, 2012), the court denied  
7 defendants' motion to submit a supplemental expert report adding at least one wholly new  
8 theory five court days before the final pretrial conference and five months after the deadline to  
9 submit supplemental expert reports, where defendants neither identified previously unavailable  
10 information nor explained why they could not have met the supplemental expert report deadline  
11 or have sought to extend it. In *Synbiotics Corp. v. Heska Corp.*, No. 98-CV-2076 W(NLS),  
12 2000 WL 35632582 (S.D. Cal. Sept. 21, 2000), the court granted a motion to strike the  
13 substantially different report of a substitute expert designated by the plaintiff without court  
14 permission two months after discovery closed, where the withdrawal of the prior expert was due  
15 to health problems the severity of which were already known when the prior expert was  
16 designated. TDY's other case, *Estate of Bojcic v. City of San Jose*, 358 Fed. Appx. 906, 907  
17 (9th Cir. 2009), simply held that the district court did not abuse discretion in preventing entirely  
18 new expert opinion testimony from being offered for the first time during a jury trial. As  
19 discussed in detail above, Mr. Jordan offers no new opinions and no new theories, and these  
20 cases are therefore inapposite.

21       Thus, none of TDY's cases is applicable here, and none supports any of the exclusions  
22 that TDY requests.

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**V. CONCLUSION**

For all of these reasons, the Court should deny TDY's motion as to Mr. Jordan's October 2011 trial deposition.

Respectfully submitted,

IGNACIA S. MORENO  
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/s/ Lewis M. Barr

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Attorneys for Defendants and Counterclaimants

Dated: March 26, 2012

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 26th day of March, 2012, I caused a true and correct copy of the “Government Memorandum In Opposition To TDY’s Motion in Limine No. 5 to Strike Expert Testimony by Tommy B. Jordan” with accompanying exhibits thereto to be served electronically via the Court’s e-filing system upon Counsel of Record.

/s/ Lewis M. Barr

LEWIS M. BARR